

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES,

Plaintiff,

v.

M. EVANS, et al.,

Defendants.

No. C 07-4277 CW (PR)

ORDER GRANTING DEFENDANT
BAILEY'S MOTION TO DISMISS

(Docket nos. 83, 85)

MALIK JONES,

Plaintiff,

v.

L. WASHINGTON, et al.,

Defendants.

No. C 09-3003 CW (PR)

ORDER REVIEWING SECOND AMENDED
COMPLAINT; DISMISSING ALL
CLAIMS AGAINST DEFENDANT P.
BROWN; REQUIRING SERVICE ON
DEFENDANTS E. RAMIREZ AND B.
BROWN; ADDRESSING PLAINTIFF'S
MOTION; AND ALLOWING FURTHER
BRIEFING ON DEFENDANTS' MOTION
TO DISMISS

(Docket no. 36)

INTRODUCTION

Plaintiff Malik Jones, a state prisoner currently incarcerated at High Desert State Prison (HDSP), filed this pro se civil rights complaint in Case no. C 07-4277 CW (PR) pursuant to 42 U.S.C. § 1983 alleging a violation of his constitutional rights while incarcerated at Salinas Valley State Prison (SVSP). On September 19, 2008, the Court found cognizable Plaintiff's Eighth Amendment claims for excessive force and deliberate indifference to his

1 safety against Defendant SVSP Correctional Officer Bailey. The
2 Court also found cognizable Plaintiff's Eighth Amendment claims for
3 excessive force and deliberate indifference to his serious medical
4 needs against Defendants SVSP Transportation Sergeant L. Washington
5 and SVSP Transportation Officers D. Lang and E. Contreras.¹ The
6 Court dismissed Plaintiff's Eighth Amendment claim for deliberate
7 indifference to safety against Defendants Washington, Lang and
8 Contreras with leave to amend. The Court dismissed Plaintiff's
9 Eighth Amendment claims against Defendant Jane Doe without
10 prejudice to filing an amended complaint to add her as a named
11 defendant once he learns her identity.

12 On February 16, 2009, Defendants Bailey, Washington, Contreras
13 and Lang filed a motion to dismiss, arguing that Plaintiff had not
14 complied with Federal Rules of Civil Procedure 18(a) and 20(a)
15 because he asserted unrelated claims against multiple Defendants.

16 On June 3, 2009, Plaintiff filed a motion entitled, "Motion
17 for leave to file an Amendant [sic] Complaint" in Case no. C 07-
18 4277 CW (PR), in which he identified Defendant Jane Doe as
19 Defendant P. Brown.

20 In an Order dated July 2, 2009, the Court partially granted
21 Defendants' motion to dismiss and severed the claims against
22 Defendants Washington, Lang, Contreras and P. Brown, assigning to
23 them a new case number: C 09-3003 CW (PR). The Court also granted
24 Plaintiff's motion to amend, and directed the Clerk of the Court to
25 substitute Defendant P. Brown for Defendant Jane Doe, but to do so

27 ¹ Defendant Contreras's name was initially misspelled as
28 "Contrazs" in Plaintiff's original complaint and the Order of
Service. However, the correct spelling is "Contreras." (Defs'.
Answer at 1.)

1 in Case no. C 09-3003 CW (PR). Meanwhile, the claims against
2 Defendant Bailey remained in Case no. C 07-4277 CW (PR).

3 The Court directed the Clerk of the Court to file in Case no.
4 C 09-3003 CW (PR) copies of the "Motion for leave to file an
5 Amendant [sic] Complaint" and the original complaint.

6 On July 22, 2009, Plaintiff filed a second amended complaint
7 (docket no. 46 in Case no. C 07-4277 CW (PR)), involving claims in
8 Case no. C 09-3003 CW (PR). Plaintiff could not file this second
9 amended complaint as of right, see Fed. R. Civ. P. 15(a), and did
10 not move for leave to amend to file it. The Court will deem his
11 filing to be a motion for leave to amend. Because it is related to
12 claims in Case no. C 09-3003 CW (PR), it will be considered in that
13 case. The Court will address the proposed second amended complaint
14 below.

15 Before the Court in Case no. C 07-4277 CW (PR) are Defendant
16 Bailey's motion to dismiss for failure to exhaust administrative
17 remedies, and his motion for summary judgment under Federal Rule of
18 Civil Procedure 56(c) for Plaintiff's failure to initiate this
19 action before the statute of limitations ran on his claims.
20 Plaintiff filed an opposition, and Defendant Bailey filed his reply
21 to the opposition.

22 Also before the Court is Plaintiff's "Supplemental Motion to
23 Add Information" in connection with his deposition held October 7,
24 2010, filed in both Case nos. C 07-4277 CW (PR) and C 09-3003 CW
25 (PR).

26 Finally, before the Court in Case no. C 09-3003 CW (PR) are
27 (1) a motion to dismiss all claims against Defendant P. Brown;
28 (2) Defendants Washington's, Lang's and Contreras's motion to

1 dismiss for failure to exhaust administrative remedies; and
2 (3) their motion for summary judgment under Federal Rule of Civil
3 Procedure 56(c) on the grounds that there is no genuine issue as to
4 any material fact, that they are entitled to judgment as a matter
5 of law, and that they are entitled to qualified immunity.
6 Plaintiff filed an opposition, and Defendants filed their reply to
7 the opposition.

8 Having considered the papers filed by the parties, the Court
9 GRANTS Defendant Bailey's motion to dismiss for failure to exhaust
10 administrative remedies in Case no. C 07-4277 CW (PR).² The Court
11 also addresses Plaintiff's motion to add information in Case nos.
12 C 07-4277 CW (PR) and C 09-3003 CW (PR). The Court DISMISSES all
13 claims against Defendant P. Brown and substitutes Defendant B.
14 Brown in Case no. C 09-3003 CW (PR). The Court orders service of
15 the complaint (docket no. 1 in Case no. C 09-3003 CW (PR)) and the
16 second amended complaint (docket no. 46 in Case no. C 07-4277 CW
17 (PR)) on Defendant B. Brown. These complaints set out cognizable
18 Eighth Amendment claims against Defendant Jane Doe, now B. Brown,
19 for the use of excessive force and for deliberate indifference to
20 medical needs. Upon considering the proposed second amended
21 complaint, the Court finds cognizable Eighth Amendment claims for
22 the use of excessive force and for deliberate indifference to
23 medical needs against Defendant Ramirez; therefore, the Court
24 GRANTS Plaintiff's motion for leave to amend to add these claims to
25 Case no. C 09-3003 CW (PR). The Court orders service of the
26 complaint (docket no. 1 in Case no. C 09-3003 CW (PR)) and second

27
28 ² Because the Court grants Defendant Bailey's motion to
dismiss, it need not address his motion for summary judgment.

1 amended complaint (docket no. 46 in Case no. C 07-4277 CW (PR)) on
2 Defendant Ramirez. Upon considering the amended Eighth Amendment
3 claim for deliberate indifference to safety against Defendants
4 Washington, Lang, Contreras and B. Brown raised by Plaintiff in his
5 second amended complaint, the Court DENIES his motion for leave to
6 amend to add this claim because he fails to state a cognizable
7 claim. Upon considering the remaining claims raised in his second
8 amended complaint, the Court also DENIES Plaintiff's motion for
9 leave to amend to add his due process and equal protection claims
10 against Defendant Ramirez as well as all claims against Defendants
11 Sanquist and Bocello. Finally, the Court will not rule on
12 Defendants Washington's, Lang's and Contreras's motion to dismiss
13 and motion for summary judgment in Case no. C 09-3003 CW (PR)
14 because it GRANTS Plaintiff's motion to supplement his opposition
15 to their motions.

16 FACTUAL BACKGROUND³

17 On June 24, 2003, Plaintiff -- who is wheel-chair bound -- and
18 his cell-mate Inmate Gentry moved from Facility D, Building 8 to
19 Facility D, Building 2. Defendant Bailey checked Plaintiff's
20 property as he moved into the new cell. Plaintiff alleges
21 Defendant Bailey "threw away Plaintiff's legal documents"
22 (Second Am. Compl. at 7.) Defendant Bailey and Plaintiff "got into
23 a verbal heated altercation." (Id.) Plaintiff alleges Defendant
24 Bailey then "pushed Plaintiff out of his wheelchair with intent to
25 inflict [sic] pain on Plaintiff." (Id.)

26 Plaintiff also claims that while he was incarcerated at SVSP,
27

28 ³ The factual background cites to documents only in Case no.
C 07-4277 CW (PR).

1 Defendant Bailey created a "false" 128G chrono which "fabricated"
2 that Plaintiff "was a child molester" and had committed "lewd and
3 or lascivious crimes against children."⁴ (Compl. at 3.) Plaintiff
4 alleges Defendant Bailey distributed the false 128G chrono to other
5 inmates in an effort to "get Plaintiff killed or seriously
6 injured." (Id.)

7 Plaintiff was transferred to HDSP on July 7, 2006.

8 On July 25, 2006,⁵ Plaintiff submitted appeal log no. SVSP
9 C-06-02436, alleging Defendant Bailey falsified a 128G chrono and
10 distributed it to other inmates in order to get Plaintiff "killed
11 or seriously injured." (Medina Decl., Ex. I.) Log no. SVSP
12 C-06-02436 was denied at the first level of review and returned to
13 Plaintiff on September 16, 2006. The screening form attached to
14 log no. SVSP C-06-02436 stated that Plaintiff's appeal was being
15 returned to him because "time constraints were not met." (Id.)

16 On October 17, 2006, Plaintiff submitted another inmate appeal
17 alleging Officer Bailey falsified a 128G chrono and distributed it
18 to other inmates in order to get Plaintiff "killed or seriously
19 injured." (Compl. at 30.) The informal level review response
20 screened out the October 17, 2006 appeal on December 14, 2006
21 because it was a "duplicate" of another. (Id. at 29.) The October
22 17, 2006 appeal was not assigned a log number.

23 On November 26, 2006, Plaintiff submitted an inmate appeal
24

25 ⁴ The record does not establish when in the year 2003 this
26 alleged event occurred.

27 ⁵ Plaintiff has written the date that he submitted log no.
28 SVSP C-06-02436 as "7-25-07." (Medina Decl., Ex. I.) The Court
assumes Plaintiff mistakenly wrote "07" instead of "06" for the
year.

1 alleging that when he received log no. SVSP C-06-02436, it was
2 "missing" the first level of review response. (Id. at 20.)
3 Plaintiff also alleged the screening-out decision for not meeting
4 time constraints showed "blatant biasness [sic]," arguing that if
5 time constraints were indeed not met, the inmate appeal would never
6 have received a log number. (Id.)

7 Plaintiff also submitted an inmate appeal at HDSP, identified
8 as log no. HDSP-06-01584, which "was related to Plaintiff's request
9 for single cell status and transfer to" SVSP. (Mot. for Summ. J.
10 at 10.) Log no. HDSP-06-01584 also identified Defendant Bailey.

11 DISCUSSION

12 I. Motion to Dismiss

13 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134,
14 110 Stat. 1321 (1996) (PLRA), amended 42 U.S.C. § 1997e to provide
15 that "[n]o action shall be brought with respect to prison
16 conditions under [42 U.S.C. § 1983], or any other Federal law, by a
17 prisoner confined in any jail, prison, or other correctional
18 facility until such administrative remedies as are available are
19 exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion
20 requirement is therefore mandatory, and no longer left to the
21 discretion of the district court. Woodford v. Ngo, 548 U.S. 81, 85
22 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

23 The PLRA's exhaustion requirement requires "proper exhaustion"
24 of administrative remedies. Woodford, 548 U.S. at 93. This means
25 "[p]risoners must now exhaust all 'available' remedies," id. at 85,
26 in "compliance with an agency's deadlines and other critical
27 procedural rules," id. at 90-91. The requirement cannot be
28 satisfied "by filing an untimely or otherwise procedurally

1 defective administrative grievance or appeal." Id. Further, the
2 remedies "available" need not meet federal standards, nor need they
3 be "plain, speedy and effective." Porter v. Nussle, 534 U.S. 516,
4 524 (2002); Booth, 532 U.S. at 739-40 & n.5. Even when the
5 prisoner seeks relief not available in grievance proceedings,
6 notably money damages, exhaustion is still a prerequisite to suit.
7 Woodford, 548 U.S. at 85-86 (citing Booth, 532 U.S. at 734); see
8 also Morton v. Hall, 599 F.3d 942, 945 (9th Cir. 2010).

9 It is the prison's requirements, and not the PLRA, that define
10 the boundaries of proper exhaustion. Jones v. Bock, 549 U.S. 199,
11 218 (2007). The California Department of Corrections and
12 Rehabilitation (CDCR) provides inmates the right to file
13 administrative appeals alleging misconduct by correctional
14 officers. See Cal. Code Regs. tit. 15, § 3084.1(e). CDCR also
15 provides inmates the right to appeal administratively "any
16 departmental decision, action, condition, or policy which they can
17 demonstrate as having an adverse effect upon their welfare." See
18 id. § 3084.1(a). In order to exhaust all available administrative
19 remedies within this system, a prisoner must submit his complaint
20 as an inmate appeal on a 602 form and proceed through several
21 levels of appeal: (1) informal level grievance filed directly with
22 any correctional staff member; (2) first formal level appeal filed
23 with one of the institution's appeal coordinators; (3) second
24 formal level appeal filed with the institution head or designee;
25 and (4) third formal level appeal filed with the CDCR director or
26 designee. Id. § 3084.5; Brodheim v. Cry, 584 F.3d 1262, 1264-65
27 (9th Cir. 2009); Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D.
28 Cal. 1997).

1 In California state prisons, the deadline for filing a 602
2 inmate appeal is fifteen working days from the date the
3 administrative decision or action being complained of is taken.
4 See Cal. Code Regs. tit. 15, § 3084.6(c); Ngo v. Woodford, 539 F.3d
5 1108, 1110 (9th Cir. 2008) (Ngo II) (finding claims unexhausted
6 where filed more than fifteen working days after date of decision,
7 i.e., after deadline in Title 15 of the California Code of
8 Regulations § 3084.6(c) had passed). However, California prison
9 regulations explicitly create an exception to the timely filing
10 requirement if the inmate does not have the opportunity to file his
11 grievance during the fifteen-day filing period. Marella v.
12 Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (remanding for
13 district court to consider whether plaintiff had the opportunity to
14 file a grievance within fifteen days after assault where his
15 injuries and subsequent segregation rendered grievance form
16 inaccessible). The appeals coordinator is only permitted to reject
17 an untimely appeal if "[t]ime limits for submitting the appeal are
18 exceeded and the appellant had the opportunity to file within the
19 prescribed time constraints." Id. (quoting Cal. Code Regs. tit.
20 15, §§ 3084.6(c) and 3084.3(c)(6)). Where the inmate has all the
21 information he needs in order to file a grievance, however, there
22 is no delay of the fifteen-day filing period. Harvey, 605 F.3d at
23 684 (distinguishing Marella and finding inmate must grieve claim of
24 excessive force within fifteen days of the date force was used,
25 when plaintiff had all the information he needed about the use of
26 force, not fifteen days from the date he later discovered he had
27 respiratory problems caused by that use of force).

28 Non-exhaustion under § 1997e(a) is an affirmative defense

1 which should be brought by the defendants in an unenumerated motion
2 to dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.
3 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Defendant Bailey has
4 done so in Case no. C 07-4277 CW (PR). The Court now considers
5 whether Defendant Bailey's evidence is adequate to establish that
6 Plaintiff failed to exhaust administrative remedies with respect to
7 the present claims.

8 In support of his motion to dismiss Defendant Bailey provides
9 the declaration of E. Medina, the appeals coordinator at SVSP.
10 Appeals Coordinator Medina conducted a computerized search of the
11 institutional appeals database for inmate appeals submitted by
12 Plaintiff and for the appeal responses. He states in his
13 declaration that he found the following:

- 14 11. None of the staff complaint inmate appeals
15 submitted by Inmate Jones was reviewed past the
16 second level of review except, Appeal No. SVSP-D-
17 03-01719. Appeal No. SVSP-D-03- 01719 was not
18 related to any conduct as described in Plaintiff's
19 complaint. See Exhibit D.
- 20 12. There were two inmate appeals submitted by Inmate
21 Jones at Salinas Valley from January 2003 to August
22 2007 that mentioned Defendant Bailey, specifically
23 Appeal No. SVSP-D- 03-02297 and Appeal No. SVSP-C-
24 06-02436. Appeal No. SVSP-D-03-02297 was not
25 reviewed past the second level of review. See
26 Appeal No. SVSP-D-03-02297 dated July 6, 2003 and
27 accompanying documents mentioned above as Exhibit
28 F. Appeal No. SVSP-C-06-02436 was screened out on
September 27, 2006. Inmate grievances that are
"screened out" are returned to the inmate with
instruction on how to correct the deficiency and
informed to resubmit once the deficiency is
correct. Plaintiff failed to resubmit the inmate
grievance. See Appeal No. Appeal No. SVSP-C-06-
02436 dated July 25, 2006 and accompanying document
mentioned as Exhibit I above.
13. Inmate Jones did not submit any inmate appeals or
have any inmate appeals proceed, past the second
level of review that were directly related to
Defendant Bailey allegedly falsifying and

1 distributing a 128G Chrono or pushing Inmate Jones
2 out of a wheelchair.

3 (Medina Decl. ¶ 11-13.)

4 The Court's review of the records to which the declaration
5 refers shows Appeals Coordinator Medina's description to be
6 accurate.

7 Plaintiff alleges SVSP prison officials "wantonly decided to
8 commit misconduct to prevent Plaintiff from exhausting." (Opp'n at
9 1.) Plaintiff argues that the administrative remedy became
10 "unavailable" for purposes of the exhaustion requirement when SVSP
11 officials prevented him from filing, and therefore he properly
12 exhausted his administrative remedies. (*Id.* at 2.)

13 The Court finds unavailing Plaintiff's argument that prison
14 officials prevented him from exhausting. Although Plaintiff is not
15 required to allege that he resorted to extraordinary measures in
16 order to exhaust his administrative remedies, conclusory
17 allegations that the administrative remedies process is inadequate
18 are insufficient to defeat dismissal for failure to exhaust. *See*
19 White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997).

20 Plaintiff also claims that log no. SVSP C-06-02436 was
21 "screened out under false pretense" (*Id.*) He argues the
22 screening-out decision for untimeliness amounted to a
23 "falsification of legal documents" designed to prevent Plaintiff
24 from exhausting his Eighth Amendment claim against Defendant
25 Bailey.

26 As Appeals Coordinator Medina explained, inmate appeals that
27 are "screened out" are returned to the inmate with instructions on
28 how to correct the deficiency. (Medina Decl. ¶ 13.) The screening

1 form attached to log no. SVSP C-06-02436 and returned to Plaintiff
2 indicated, "If you allege the above reason is inaccurate, then
3 attach an explanation on a separate piece of paper, or use the back
4 of this screen-out." (Medina Decl., Ex. I.) "Please return this
5 form to the Appeals Coordinator with the necessary information
6 attached." (Id.)

7 Plaintiff does not allege, nor does the record indicate, that
8 he returned the form to the Appeals Coordinator with an explanation
9 alleging the screening-out decision for untimeliness was
10 inaccurate. Neither does Plaintiff allege that he did not have
11 "the opportunity to file within the prescribed time constraints."
12 Marella, 568 F.3d at 1027. To the contrary, Plaintiff claims
13 that once he learned Defendant Bailey passed around a falsified
14 128G chrono to other prisoners, he "confronted" Defendant Bailey
15 himself. (Am. Compl. at 4.)

16 Therefore, the Court finds that because Plaintiff failed to
17 complete the administrative review process in accordance with
18 SVSP's applicable procedural rules,⁶ his claims against Defendant
19 Bailey are DISMISSED as unexhausted.

20 Accordingly, Defendant Bailey's motion to dismiss filed in
21
22

23 ⁶ The record shows that after he was transferred to HDSP,
24 Plaintiff completed the administrative review process as to log no.
25 HDSP-06-01584 -- which identifies Defendant Bailey. However,
26 Plaintiff could not exhaust his administrative remedies at HDSP
27 with respect to his Eighth Amendment claim against Defendant Bailey
28 stemming from the alleged falsified 128G chrono because he sought
relief from HDSP, not from SVSP. As such, log no. HDSP-06-01584
does not serve to exhaust Plaintiff's Eighth Amendment claim
against Defendant Bailey.

1 Case no. C 07-4277 CW (PR) is GRANTED.⁷ Dismissal is without
2 prejudice to refiling if he is able to exhaust these claims. The
3 Clerk shall enter judgment in accordance with this Order, terminate
4 all pending motions and close the file.

5 II. Defendant P. Brown's Motion to Dismiss; Plaintiff's Second
6 Amended Complaint; and Plaintiff's Motion to Supplement in
Case no. C 09-3003 CW (PR)

7 The Court now reviews the second amended complaint filed in
8 Case no. C 07-4277 CW (PR) (docket no. 46). First, because it is
9 related to the claims in Case no. C 09-3003 CW (PR), the Court
10 directs the Clerk to file the second amended complaint in Case no.
11 C 09-3003 CW (PR).

12 A. Defendant Brown

13 As mentioned above, in the Order of Service in Case no. C 07-
14 4277 CW (PR), the Court dismissed Plaintiff's Eighth Amendment
15 claims for excessive force and deliberate indifference against
16 Defendant Jane Doe with leave to amend. In Plaintiff's "Motion for
17 leave to file an Amendant [sic] Complaint" (docket no. 44 in Case
18 no. C 07-4277 CW (PR)), he identified Defendant Jane Doe as "P.
19 Brown." (Pl.'s Mot. for Lv. to File Am. Compl. in Case no. C 07-
20 4277 CW (PR) at 1.)

21 In an Order dated July 2, 2009, the Court granted Plaintiff's
22 motion and directed the Clerk to substitute Defendant P. Brown for
23 Defendant Jane Doe, but to do so in Case no. C 09-3003 CW (PR).

24 In the dispositive motion filed in Case no. C 09-3003 CW (PR),
25

26 ⁷ Because the Court grants Defendant Bailey's motion to
27 dismiss for Plaintiff's failure to exhaust administrative remedies,
28 it need not decide his motion for summary judgment under Federal
Rule of Civil Procedure 56(c) for Plaintiff's failure to initiate
this action before the statute of limitations ran on his claims.

1 Defendants claim that Defendant P. Brown was "erroneously
2 identified as a transportation officer in the vehicle with
3 Plaintiff during the transport to [HDSP] in a response to
4 Plaintiff's discovery request." (Defs.' Mot. to Dismiss and Mot.
5 for Summ. J. in Case no. C 09-3003 CW (PR) at 18.) They further
6 state that Defendant P. Brown was "working as a correctional
7 officer at Mule Creek State Prison on the day of the alleged
8 incident," and thus "not involved in any way with the events
9 occurring on July 7, 2006" at SVSP. (Id. at 18-19.) Therefore,
10 they argue that all claims against Defendant P. Brown should be
11 dismissed from this case. (Id. at 19.) Defendants have also
12 amended their discovery response to identify the transportation
13 officer as "B. Brown." (Id.)

14 Accordingly, the Court partially GRANTS the dispositive motion
15 filed in Case no. C 09-3003 CW (PR) as to Defendant P. Brown and
16 dismisses all claims against her. The Clerk is directed to amend
17 the docket in Case no. C 09-3003 CW (PR) to reflect the correct
18 initial of Defendant Brown's first name as "B." The Court orders
19 service of the complaint (docket no. 1 in Case no. C 09-3003 CW
20 (PR)) and the second amended complaint (docket no. 46 in Case no.
21 C 07-4277 CW (PR)) on Defendant B. Brown. These complaints set out
22 cognizable Eighth Amendment claims against Defendant Jane Doe, now
23 B. Brown, for the use of excessive force and for deliberate
24 indifference to medical needs.

25 B. Eighth Amendment Claims against Defendants Washington,
26 Lang, Contreras and B. Brown for Deliberate Indifference
to Safety

27 Plaintiff alleges in his original complaint in Case no. C 07-
28 4277 CW (PR) that Defendants Washington, Lang, Contreras and Jane

1 Doe (now B. Brown) violated his Eighth Amendment right to be free
2 of cruel and unusual punishment when they "forcibly" took him to
3 HDSP. (Compl. at 6.)

4 The Eighth Amendment requires that prison officials take
5 reasonable measures to guarantee the safety of prisoners. Farmer
6 v. Brennan, 511 U.S. 825, 832 (1994). The failure of prison
7 officials to protect inmates from dangerous conditions at the
8 prison violates the Eighth Amendment only when two requirements are
9 met: (1) the deprivation alleged is, objectively, sufficiently
10 serious; and (2) the prison official is, subjectively, deliberately
11 indifferent to inmate safety. Farmer, 511 U.S. at 834; Hearns v.
12 Terhune, 413 F.3d 1036, 1040-41 (9th Cir. 2005).

13 The Court dismissed Plaintiff's Eighth Amendment claim for
14 deliberate indifference to safety against Defendants Washington,
15 Lang, Contreras and Brown in Case no. C 07-4277 CW (PR) on the
16 ground that Plaintiff had not "alleged that he was in any more
17 danger at HDSP than he was at SVSP." (Order of Service at 10.)
18 The Court instructed Plaintiff that if he "can truthfully allege
19 facts that would support a claim that particular prison officials
20 transferred him to HDSP with deliberate indifference to particular
21 facts establishing serious danger to his safety there, he may move
22 for leave to amend his complaint." (Id.)

23 The Court now considers the proposed second amendment
24 complaint which Plaintiff has filed in Case no. C 07-4277 CW (PR).
25 In it, he alleges the "unwarranted adverse transfer was done so
26 that prison official would have easier access to harass,
27 retaliate," and "attempt to kill." (Second Am. Compl. at 9.) He
28 claims HDSP officials "continually attempt[ed] and almost succeeded

1 [sic] several times" to kill Plaintiff. Plaintiff alleges these
2 attempts "severely" injured and "permanently disabled" Plaintiff.
3 (Id.)

4 While Plaintiff has alleged his belief that he was in more
5 danger at HDSP, he has failed to allege facts that would support a
6 claim that Defendants Washington, Lang, Contreras and B. Brown
7 transferred him to HDSP knowing that he faced serious danger to his
8 safety there. Instead, Plaintiff makes conclusory allegations that
9 these Defendants were deliberately indifferent to his safety by
10 transferring him to HDSP. Such conclusory allegations are not
11 sufficient to show that these Defendants were "subjectively
12 deliberately indifferent" to Plaintiff's safety. See Farmer, 511
13 U.S. at 834. Because Plaintiff fails to state a cognizable claim,
14 his motion for leave to amend to add his Eighth Amendment claim for
15 deliberate indifference to his safety against Defendants
16 Washington, Lang, Contreras and B. Brown is DENIED.

17 C. Plaintiff's Supplemental Motion to Add Information

18 Plaintiff moves to add information in connection with his
19 deposition on October 7, 2010. In support of his motion, Plaintiff
20 states "he will expound on facts in connection with incidents of
21 Defendants P./B. Brown and Lang stoping [sic] along the way of
22 forced transfer and forcing Plaintiff to drink and swallow a liquid
23 substance that . . . discombobulated Plaintiff and made him more
24 helpless" (Mot. to Add Information at 1.)

25 This claim appears to relate to the allegations in Case no.
26 C 09-3003 CW (PR). Therefore, the Court construes Plaintiff's
27 motion to add information as a motion to supplement his opposition
28 in that case. Plaintiff is granted leave to file a supplemental

1 opposition to Defendants' motion to dismiss and motion for summary
2 judgment in Case no. C 09-3003 CW (PR) within thirty (30) days of
3 this Order. If Defendants wish to file a supplemental response to
4 Plaintiff's supplemental opposition, they may do so no later than
5 fifteen (15) days after Plaintiff's supplemental opposition is
6 filed.

7 D. Defendant Ramirez

8 In Case no. C 09-3003 CW (PR), the Court found that Plaintiff
9 stated a claim that Defendants Washington, Lang, Contreras and Jane
10 Doe (now B. Brown) violated Plaintiff's Eighth Amendment rights by
11 using excessive force against him on July 7, 2006 during his
12 transfer to HDSP and by being deliberately indifferent to his
13 serious medical needs when they failed to treat his injuries.
14 Plaintiff also alleges in his proposed second amended complaint
15 that Defendant Ramirez violated his Eighth and Fourteenth Amendment
16 rights in that he "aided and abeded [sic] Defendants and other
17 prison officials" in Plaintiff's transfer to HDSP. (Second Am.
18 Compl. at 8.)

19 As noted above, a prison official violates the Eighth
20 Amendment when two requirements are met: (1) the violation alleged
21 must be, objectively, sufficiently serious, see Farmer, 511 U.S. at
22 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and
23 (2) the prison official must possess a sufficiently culpable state
24 of mind, see id. (citing Wilson, 501 U.S. at 297). In determining
25 whether a deprivation of a basic necessity, such as medical care,
26 is sufficiently serious to satisfy the objective component of an
27 Eighth Amendment claim, a court must consider the circumstances,
28 nature, and duration of the deprivation. The more basic the need,

1 the shorter the time it can be withheld. See Johnson v. Lewis, 217
2 F.3d 726, 731 (9th Cir. 2000).

3 In prison-conditions cases, the necessary state of mind is one
4 of "deliberate indifference." See, e.g., Farmer, 511 U.S. at 834.
5 A prison employee is deliberately indifferent if he knows that a
6 prisoner faces a substantial risk of serious harm and disregards
7 that risk by failing to take reasonable steps to abate it. Id. at
8 837.

9 Liberally construed, Plaintiff's allegations that Defendant
10 Ramirez "aided and abetted" the actions of Defendants Washington,
11 Lang, Contreras and B. Brown of failing to attend to his injuries
12 during his transfer to HDSP states a claim for deliberate
13 indifference to his serious medical needs. See Estelle v. Gamble,
14 429 U.S. 97, 104 (1976) (deliberate indifference to serious medical
15 needs presents a cognizable claim for violation of the Eighth
16 Amendment). Liberally construed, Plaintiff's allegations that
17 Defendant Ramirez "aided and abetted" the actions of these
18 Defendants during the transfer also state a claim for excessive
19 force. Accordingly, Plaintiff has adequately plead cognizable
20 claims against Defendant Ramirez for deliberate indifference to his
21 medical needs and excessive force. Therefore, the Court GRANTS
22 Plaintiff's motion for leave to amend to add these claims to Case
23 no. C 09-3003 CW (PR).

24 However, Plaintiff's due process claim against Defendant
25 Ramirez challenging his transfer to HDSP is not cognizable because
26 it is well established that prisoners have no constitutional right
27 to incarceration in a particular institution. See Olim v.
28 Wakinekona, 461 U.S. 238, 244-48 (1983); Meachum v. Fano, 427 U.S.

1 215, 224 (1976). Further, Plaintiff's equal protection claim
2 against Defendant Ramirez is not cognizable because does not argue
3 that the mistreatment alleged occurred because of his race.

4 Accordingly, the Court DENIES Plaintiff's motion for leave to
5 amend to add his Fourteenth Amendment due process and equal
6 protection claims against Defendant Ramirez.

7 E. Defendants Sanquist and Bocello

8 Plaintiff alleges Defendants Sanquist and Bocello violated his
9 Eighth and Fourteenth Amendment rights on a number of occasions.⁸
10 Plaintiff claims Defendant Sanquist "maliciously and sadistically"
11 struck Plaintiff with a pair of handcuffs, "chipping [sic]
12 Plaintiff's tooth," in violation of his Eighth and Fourteenth
13 Amendment rights. (Id. at 9.) Defendant Bocello allegedly
14 sexually assaulted him in violation of his Eighth and Fourteenth
15 Amendment rights. Plaintiff also alleges both Defendants Sanquist
16 and Bocello forced Plaintiff to sleep in a "cage" on a concrete
17 floor for two days without a mattress, bedding or food, in
18 violation of his Eighth and Fourteenth Amendment rights. (Id.)
19 The Court DENIES Plaintiff's motion for leave to amend to add his
20 claims alleged against Defendants Sanquist and Bocello because they
21 are not related to the claims before the Court. If Plaintiff
22 wishes to raise these claims, he must file a new civil rights
23 action after exhausting his administrative remedies.

24
25 ⁸ Plaintiff also alleges Defendants Evans and Martines
26 violated his Eighth and Fourteenth Amendment rights because they
27 "never responded to Plaintiff's request for interviews" concerning
28 his transfer to HDSP and, as such, aided and abetted the transfer.
(Second Am. Compl. at 7-8). Plaintiff raised this claim in his
original complaint, and the Court did not find it cognizable.
Therefore, the Court does not grant Plaintiff leave to raise this
claim again.

CONCLUSION

For the foregoing reasons,

1. The Court orders the following as to Case. no. c 07-4277 CW (PR):

a. The Court finds that the evidence is adequate to support Defendant Bailey's affirmative defense of non-exhaustion of administrative remedies, and GRANTS Defendant Bailey's Rule 12(b) unenumerated motion to dismiss Plaintiff's excessive force and deliberate indifference to safety claims as unexhausted (docket no. 85 in Case no. C 07-4277 CW (PR)). Dismissal is without prejudice to re-filing if Plaintiff is able to exhaust these claims.

b. The Clerk shall enter judgment in accordance with this Order, terminate all pending motions in this case, including Plaintiff's motion to add information (docket no. 83 in Case no. C 07-4277 CW (PR)), and close the file.

2. The Court orders the following as to Case no. C 09-3003 CW (PR):

a. The Clerk shall file Plaintiff's second amended complaint (docket no. 46 in Case no. C 07-4277 CW (PR)) in Case no. C 09-3003 CW (PR).

b. The Court partially GRANTS the dispositive motion (docket no. 38) filed in Case no. C 09-3003 CW (PR) as to Defendant P. Brown. All claims against Defendant P. Brown are DISMISSED. The Clerk is directed to amend the docket in Case no. C 09-3003 CW (PR) to reflect the correct initial of Defendant Brown's first name as "B."

c. The Court will not rule on Defendants Washington's, Lang's and Contreras's motion to dismiss and motion for summary

1 judgment in Case no. C 09-3003 CW (PR). Plaintiff's Supplemental
2 Motion to Add Information (docket no. 36 in Case no. C 09-3003 CW
3 (PR)) -- which has been construed as a motion to supplement his
4 opposition -- is GRANTED. Plaintiff may file a supplemental
5 opposition to these Defendants' motion to dismiss and motion for
6 summary judgment within thirty (30) days of this Order. If
7 Defendants Washington, Lang and Contreras wish to file a
8 supplemental response to Plaintiff's supplemental opposition, they
9 may do so no later than fifteen (15) days after Plaintiff's
10 supplemental opposition is filed.

11 d. Plaintiff's motion for leave to amend to add his
12 claims alleged against Defendants Sanquist and Bocello is DENIED
13 because they are not related to the claims before the Court. If
14 Plaintiff wishes to raise these claims, he must file a new civil
15 rights action after exhausting his administrative remedies.

16 e. Plaintiff has alleged cognizable Eighth Amendment
17 claims against Defendant Ramirez for use of excessive force and
18 deliberate indifference to his serious medical needs; therefore,
19 the Court GRANTS his motion for leave to amend to add these claims
20 to Case no. C 09-3003 CW (PR). The Court DENIES Plaintiff's motion
21 for leave to amend to add his Eighth Amendment claim for deliberate
22 indifference to his safety against Defendants Washington, Lang,
23 Contreras and Brown as well as his due process and equal protection
24 claims against Defendant Ramirez.

25 f. The Clerk shall mail a Notice of Lawsuit, a Request
26 for Waiver of Service of Summons, two copies of the Waiver of
27 Service of Summons, copies of the complaint and all attachments
28 thereto (docket no. 1 in Case no. C 09-3003 CW (PR)), the second

1 amended complaint and all attachments thereto (docket no. 46 in
2 Case no. C 07-4277 CW (PR)), the Orders dated November 19, 2008 and
3 July 2, 2009 (docket nos. 14, 45 in Case no. C 07-4277 CW (PR)),
4 and this Order to SVSP Officers E. Ramirez and B. Brown. The Clerk
5 shall also mail a copy of the complaint and a copy of this Order to
6 Adrian Shin at the State Attorney General's Office in San
7 Francisco, the attorney representing Defendants Washington, Lang
8 and Contreras. Additionally, the Clerk shall mail a copy of this
9 Order to Plaintiff.

10 g. Defendants Ramirez and B. Brown are cautioned that
11 Rule 4 of the Federal Rules of Civil Procedure requires them to
12 cooperate in saving unnecessary costs of service of the summons and
13 complaint. Pursuant to Rule 4, if these Defendants, after being
14 notified of this action and asked by the Court, on behalf of
15 Plaintiff, to waive service of the summons, fail to do so, they
16 will be required to bear the cost of such service unless good cause
17 be shown for their failure to sign and return the waiver form. If
18 service is waived, this action will proceed as if these Defendants
19 had been served on the date that the waiver is filed, except that
20 pursuant to Rule 12(a)(1)(B), they will not be required to serve
21 and file an answer before sixty (60) days from the date on which
22 the request for waiver was sent. (This allows a longer time to
23 respond than would be required if formal service of summons is
24 necessary.) Defendants Ramirez and B. Brown are asked to read the
25 statement set forth at the foot of the waiver form that more
26 completely describes the duties of the parties with regard to
27 waiver of service of the summons. If service is waived after the
28 date provided in the Notice but before these Defendants have been

1 personally served, the Answer shall be due sixty (60) days from the
2 date on which the request for waiver was sent or twenty (20) days
3 from the date the waiver form is filed, whichever is later.

4 h. Defendants Ramirez and Brown shall answer the
5 complaint in accordance with the Federal Rules of Civil Procedure.
6 The following briefing schedule shall govern dispositive motions in
7 this action:

8 1) No later than thirty (30) days from the date
9 these Defendants' answer is due, they shall file a motion for
10 summary judgment or other dispositive motion. The motion shall be
11 supported by adequate factual documentation and shall conform in
12 all respects to Federal Rule of Civil Procedure 56. They may join
13 in Defendants Washington's, Lang's and Contreras's motion to
14 dismiss and motion for summary judgment. If these Defendants are
15 of the opinion that this case cannot be resolved by summary
16 judgment, they shall so inform the Court prior to the date the
17 summary judgment motion is due. All papers filed with the Court
18 shall be promptly served on Plaintiff.

19 2) Plaintiff's opposition to the dispositive
20 motion shall be filed with the Court and served on these Defendants
21 no later than thirty (30) days after the date on which their motion
22 is filed. The Ninth Circuit has held that the following notice
23 should be given to pro se plaintiffs facing a summary judgment
24 motion:

25 The defendant has made a motion for summary
26 judgment by which they seek to have your case dismissed.
27 A motion for summary judgment under Rule 56 of the
28 Federal Rules of Civil Procedure will, if granted, end
your case.

Rule 56 tells you what you must do in order to

1 oppose a motion for summary judgment. Generally, summary
2 judgment must be granted when there is no genuine issue
3 of material fact -- that is, if there is no real dispute
4 about any fact that would affect the result of your case,
5 the party who asked for summary judgment is entitled to
6 judgment as a matter of law, which will end your case.
7 When a party you are suing makes a motion for summary
8 judgment that is properly supported by declarations (or
9 other sworn testimony), you cannot simply rely on what
10 your complaint says. Instead, you must set out specific
11 facts in declarations, depositions, answers to
12 interrogatories, or authenticated documents, as provided
13 in Rule 56(e), that contradict the facts shown in the
14 defendant's declarations and documents and show that
15 there is a genuine issue of material fact for trial. If
16 you do not submit your own evidence in opposition,
17 summary judgment, if appropriate, may be entered against
18 you. If summary judgment is granted [in favor of the
19 defendant], your case will be dismissed and there will be
20 no trial.

21 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
22 banc).

23 Plaintiff is advised to read Rule 56 of the Federal Rules of
24 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
25 (party opposing summary judgment must come forward with evidence
26 showing triable issues of material fact on every essential element
27 of his claim). Plaintiff is cautioned that because he bears the
28 burden of proving his allegations in this case, he must be prepared
to produce evidence in support of those allegations when he files
his opposition to these Defendants' dispositive motion. Such
evidence may include sworn declarations from himself and other
witnesses to the incident, and copies of documents authenticated by
sworn declaration. Plaintiff will not be able to avoid summary
judgment simply by repeating the allegations of his complaint.

3) If Defendants Ramirez and Brown wish to file a
reply brief, they shall do so no later than fifteen (15) days after
the date Plaintiff's opposition is filed.

1 4) The motion shall be deemed submitted as of the
2 date the reply brief is due. No hearing will be held on the motion
3 unless the Court so orders at a later date.

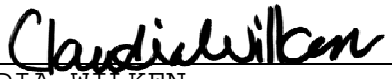
4 i. It is Plaintiff's responsibility to prosecute this
5 case. Plaintiff must keep the Court informed of any change of
6 address and must comply with the Court's orders in a timely
7 fashion.

8 j. Extensions of time are not favored, though
9 reasonable extensions will be granted. Any motion for an extension
10 of time must be filed no later than fifteen (15) days prior to the
11 deadline sought to be extended.

12 3. This Order terminates Docket nos. 83 and 85 in Case no.
13 C 07-4277 CW (PR) and Docket no. 36 in Case no. C 09-3003 CW (PR).

14 IT IS SO ORDERED.

15 DATED: 3/31/2011



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES,

Plaintiff,

v.

MIKE EVANS, WARDEN et al,

Defendant.

Case Number: CV07-04277 CW
CV09-3003CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 31, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Malik Jones K-09065
FC-O-3-116
P.O. Box 1050
Soledad, CA 93960

Adrian Shin
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Officer E. Ramirez
Salinas Valley State Prison
P.O. box 1020
Soledad, CA 93960-1020

Officer B. Brown
Salinas Valley State Prison
P.O. box 1020
Soledad, CA 93960-1020

Dated: March 31, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk